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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JEFFREY OSWALT, **Petitioner,** **v.** **WORKERS' COMPENSATION APPEALS BOARD, JONES & LEWIS MORTUARY et al.,** **Respondents.**	**A112612** **(Workers' Compensation Appeals Board No. SRO 126352, 126353)**

Petitioner Jeffrey Oswalt's claim for permanent disability benefits was denied because he had received a prior permanent disability award for an overlapping disability. Oswalt argues that there was not substantial evidence in the record to support the conclusion that a statutory presumption barred his recovery. We agree and vacate the order.

BACKGROUND

In 1997, Oswalt injured his right ankle while working as a police officer. By 2000, he was working as an apprentice embalmer for Jones & Lewis Mortuary, the respondent employer in this action. In October 2001, Oswalt twice injured his low back while working for Jones & Lewis. A qualified medical examiner, Dr. McCoy, diagnosed Oswalt with a permanent low back injury resulting from the October 2001 incidents.

Oswalt filed a Workers' Compensation claim for temporary and permanent disability benefits his employer had denied.

A hearing was held before a Workers' Compensation administrative law judge (WCJ). The contested issue that we address is whether the permanent low back disability caused by the October 2001 incidents should be apportioned in part or whole to the disability that was caused by the 1997 incident. After the 1997 injury, Oswalt had no reservations about being able to perform his job at the mortuary, suggesting he had medically rehabilitated from the prior disability before the October 2001 injury occurred. His Workers' Compensation claim for the 1997 ankle injury was settled by a compromise and release. Respondent produced a 1997 medical report that described Oswalt's work restrictions following his ankle injury, and a 2005 medical report in which Dr. McCoy reviewed medical records of both the ankle injury and the 2001 low back injuries and rendered an opinion about apportionment. The 2005 report is not in the record, but respondent represented that Dr. McCoy "opine[d] that no additional disability was warranted after taking into consideration the previous ankle injury for his industrial injury."

Based on the 1997 and 2005 medical reports, the WCJ found that Oswalt's "pre-existing disability from an earlier right ankle injury completely overlap[ped] the disability caused by the applicant's industrial injuries to his low back." He found the October 2001 low back injury "has not caused any permanent disability."

Oswalt filed a petition for reconsideration. The WCJ prepared a Report and Recommendation denying the petition, which was adopted by the Workers' Compensation Appeals Board (WCAB). On apportionment, the WCJ relied on Labor Code section 4664, subdivision (b)[1] to reach the conclusion that permanent disability benefits should be denied due to a complete overlap of the disabilities.

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[1] All statutory references are to the Labor Code unless otherwise indicated.

Oswalt filed a petition for a writ of review. We requested supplemental briefing on the apportionment issue. The employer did not respond. The WCAB conceded error. We then issued a writ of review on the limited issue of the denial of permanent disability benefits for Oswalt's low back injury, and stated the record previously submitted by the parties was adequate for our review.

DISCUSSION

On review of a WCAB order, we consider whether the order is supported by substantial evidence and whether any factual findings made or adopted by the WCAB support the order. (§ 5952, subd. (d).) Oswalt argues there was not substantial evidence in the record to support the WCJ's conclusion, subsequently adopted by the WCAB, that a conclusive presumption in section 4664, subdivision (b) barred Oswalt's claim for permanent disability benefits for his low back injury.

Sections 4663 and 4664, as enacted by Senate Bill 899 in 2004 (Stats. 2004, ch. 34, §§ 34-35), govern apportionment of permanent disability awards. Section 4663 provides, "Apportionment of permanent disability shall be based on causation." (§ 4663, subd. (a); see also § 4664, subd. (a).) A physician must determine what percentage of an applicant's permanent disability was caused by the work-related injury and what percentage was "caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (§ 4663, subd. (c).)

Section 4664 subdivision (b) establishes a conclusive presumption applicable to the apportionment analysis: "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury." In *Strong v. City and County of San Francisco* (2005) 70 Cal.Comp.Cases 1460, the WCAB ruled en banc that the defendant bears the burden of proving the existence of a prior award of permanent disability under section 4664, subdivision (b); if the defendant meets that burden, the conclusive

presumption applies and the applicant is not permitted to show medical rehabilitation from the disabling effects of earlier industrial injuries and must disprove overlap between the current and prior disabilities to obtain a permanent disability award. (*Strong*, at pp. 1461-1462, 1472.)

In his Report and Recommendation to the WCAB, the WCJ discussed section 4664, subdivision (b) and *Strong*; reviewed the medical evidence of overlap between the 1997 and 2001 disabilities; and concluded "the applicant has not disproven that overlap exists." It is clear that the WCJ applied the conclusive presumption of section 4664, subdivision (b).

The WCJ erred by applying this presumption because the defendant did not meet its burden of proving the existence of a prior *award* of permanent disability. The only evidence in the record of the resolution of the 1997 claim, arguably a prior award of permanent disability, is Oswalt's testimony that he settled the 1997 ankle injury case in a compromise and release. This evidence is not persuasive. In *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, the WCAB ruled en banc that an order approving a compromise and release is not, without more, a "prior award of permanent disability" within the meaning of section 4664, subdivision (b). (*Pasquotto*, at p. 224.) A different case might be presented if a compromise and release identified how much of the settlement funds represented compensation for the prior permanent disability (*id.* at p. 232), but no evidence of the terms appears in the record here. In its supplemental letter brief, the WCAB conceded error.

Where the conclusive presumption does not apply, an applicant may avoid apportionment by demonstrating that he had medically rehabilitated from the disabling effects of the prior industrial injury before incurring the current industrial injury. (*Pasquotto, supra,* 71 Cal.Comp.Cases at p. 237.) Because the WCJ applied the conclusive presumption, he did not reach the question of whether Oswalt made that

showing. Therefore, we must remand for consideration of this issue and other issues necessary to determine apportionment.

Oswalt argues that remand is unnecessary and urges us to award him permanent disability based on the evidence in the record. Remand is appropriate so the WCJ may determine in the first instance whether Oswalt's claim of rehabilitation is credible and, if so, whether his prior permanent disability may nevertheless be an "other factor" that is causing his current disability pursuant to section 4663. (*Pasquotto, supra*, 71 Cal.Comp.Cases at pp. 237-238; § 5952.)

DISPOSITION

The WCAB Order Denying Reconsideration is annulled with respect to its denial of Oswalt's claim for permanent disability benefits based on his low back injury. The case is remanded to the WCAB for further proceedings on the apportionment issue consistent with this opinion.

GEMELLO, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.*

* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.